FREE COPY

JAN 19 19

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 535.

GREGG CARTAGE & STORAGE COMPANY,
HUGH WELLS,
Trustee in Bankruptcy of the Gregg Cartage & Storage Company,
and
NORTHEASTERN TRANSPORTATION COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANTS.

HOWELL LEUCK,
H. D. DRISCOLL,
BINGHAM W. ZELLMER,
H. RUSSELL BISHOP,
Attorneys for Appellants.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

INDEX.

Opinion Below 1

Jurisdiction 2

Statement of Facts 3

Specification of Errors to be Urged 8

Summary of Argument 10

Argument:

Point I. The Record Does Not Disclose a Rational Basis for the Conclusions Approved by the Commission 13

Point II. The Act of the Commission in Withholding from the Appellant Benefits Under Section 212A, Part II, Interstate Commerce Act (49 U. S. C. Sec. 312A) was Arbitrary, Discriminatory and Unconstitutional 19

Point III. It is Error to Construe Sections 206A and 209A of Part II of the Interstate Commerce Act as Requiring Continuous Operation from June 1, 1935, to the Date of the Grant of the Application for a Certificate of Public Convenience and Necessity ... 22

A. The construction of the Act by the Interstate Commerce Commission and District Court is contrary to the principle that the intent will be gathered from the words used 22

B. The construction of the statute adopted here ignores the rule that a statute speaks as of the date of its taking effect 24

Point IV. The Commission Should Have Made a Finding as to the Time When the Rights Expired 26

Point V. The Interruption of Services was Not Within the Control of the Applicant 27

A. The causes of the bankruptcy were not within the control of the applicant 27

B. Events Subsequent to the Appointment of the State Receiver Were Not Within the Control of The Gregg Cartage & Storage Company in Any Sense 31

C. The Intersiate Commerce Commission was responsible for the continued interruption of operations 37

Point VI. The Commission and the District Court Erred in Deciding the Questions of Bankruptcy Law Involved 40

A. The decision destroys, instead of preserving, assets, which is one of the prime purposes of the Act 40

B. The decisions of the Commission and the District Court are based upon doubtful authority 42

C. Central Trust Company v. Chicago Auditorium Association is in conflict with provisions of the Bankruptcy Act as amended and should be overruled 44

Point VII. The Commission in its Decision upon the Question as to Whether or Not Cessation of Operations was Within the Control of the Applicant has Acted in an Arbitrary and Unjust Manner and Not in Accord With its Own Prior Decisions 45

Appendix A—Statutes Involved:

Part II of the Interstate Commerce Act 54

Application for Certificate of Public Convenience and Necessity 54

Sec. 206. (a) 54

Permits for Contract Carriers by Motor Vehicle ... 55

Sec. 209. (a) 55

Suspension, Change, Revocation, and Transfer of Certificates, Permits, and Licenses 56

Sec. 212. (a) 56

Sec. 212. (b) 57

Bankruptcy Act Sec. 70 (B) 11 U. S. C. Sec. 110 (B) 57

Appendix B—Representative List of Cases Decided by Interstate Commerce Commission Involving Question of Whether or Not Interruption of Service Was Within the Control of the Applicant 59

Cases Cited.

Bailey v. Glover, 21 Wall. 342 40

Black Hills Transportation Company Common Carrier Application, 2 M. C. C. 391 49

Board of Trade of Kansas City, et al. v. United States, et al., decided January 5, 1942, O. T. 1941, No. 143 . 29

Bramwell v. U. S. Fidelity & Guaranty Co., 269 U. S. 483 43

Caminetti v. United States, 242 U. S. 470, 490 23

Case v. Los Angeles Lumber Products Co., 308 U. S. 106 34

Central Trust Company v. Chicago Auditorium Association, 240 U. S. 581 ..... 12, 40, 42, 44

Clement v. Packer, 125 U. S. 309 18

W. D. Cochran Common Carrier Application, 3 M. C. C. 717 51

Conor Common Carrier Application, 1 M. C. C. 327 ... 52

Crooks v. Harrelson, 282 U. S. 55, 60 23

Eicholz v. Missouri Public Service Commission, 306 U. S. 268 ..... 24, 25

H. H. Enders Truck Line, Inc. Common Carrier Application, 29 M. C. C. 639 ..... 45, 46, 47, 48, 49

Flamming Common Carrier Application, 20 M. C. C. 63 52

Francis v. McNeal, 228 U. S. 695 40

Matter of Harley (Ref. Cal.), 10 Am. B. R. (N. S.) 687 ..... 35, 36

Hassett v. Welch, 303 U. S. 303 26

Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, 89 23

Hunt Common Carrier Application, 3 M. C. C. 261 52

Imperial Assurance Co. v. Livingston (C. C. A. 8), 49 F. (2d) 745 35

Isaac v. Hobbs Tie & Timber Company, 282 U. S. 734 34

Kirk Transportation Co. Common Carrier Application, 7 M. C. C. 362 50

Kothe v. R. C. Taylor Trust, 280 U. S. 224 40

Lincoln v. French, 105 U. S. 614 18

McDonald v. Thompson, 305 U. S. 263 ..... 24, 25

Matter of Metropolitan Motor Car Co., 225 F. 274 35

John Minnehan Contract Carrier Application, 26 M. C. C. 533 49

Mississippi Valley Barge Line Company v. United States, 292 U. S. 282 17

Morgan v. United States, 304 U. S. 1 39

Nevin Midland Lines Common Carrier Application, 4 M. C. C. 547 50

O & W Transit Company Common Carrier Application, 4 M. C. C. 575 51

Packard v. O'Neil, 45 Idaho 427, 262 P. 881, 56 A. L. R. 317 18

Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184, 199 23

Matter of Piece Dyeing Co., Inc., 89 F. (2d) 37, 40 35

Rea & Starr Common Carrier Application, 2 M. C. C. 387 51

Reynolds v. McArthur, 2 Pet. 417, 434 26

Rochester Telephone Corporation v. United States, 307 U. S. 123 16

Shurat v. Doyle, 258 U. S. 529 26

Matter of Singer Furniture Corporation, 47 F. (2d) 780 35

Straton v. New, 283 U. S. 318 40

Swayne & Hoyt v. United States, 300 U. S. 297 16

Taft v. Commissioner of Internal Revenue, 304 U. S. 351, 359 23

Thompson v. Magnolia Petroleum Company, 309 U. S. 478 34

In Re United Cigar Stores, 69 F. (2d) 513, 515 37

United States v. American Trucking Association, 310 U. S. 534 23

United States v. Heth, 3 Cranch 399, 413 26

United States v. Magnolia Petroleum Co., 276 U. S. 160, 162 26

United States v. Missouri P. R. Co., 278 U. S. 269, 278 23

U. S. Fidelity & G. Co. v. Bray, 225 U. S. 205 34

George Van Camp & Sons Co. v. American Can Co., 278 U. S. 245, 253 23

Weaver v. Palmer Bros. Co., 270 U. S. 402 43

Welch v. New Hampshire, 306 U. S. 79 ..... 24, 25

Matter of Wiener, 7 F. Supp. 691, aff'd. (C. C. A. 3) 72 F. (2d) 1010 35

Wilbur v. United States, 284 U. S. 231, 237 23

Williams Transportation Co., Inc., Docket No. MC-9888 49

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 535.

GREGG CARTAGE & STORAGE COMPANY,
HUGH WELLS,
Trustee in Bankruptcy of the Gregg Cartage & Storage Company,
and
NORTHEASTERN TRANSPORTATION COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANTS.

OPINION BELOW.

The per curiam opinion of the especially constituted district court entered on February 20, 1941, is not officially reported. It is found in the record on pages 99 to 104 inclusive.

JURISDICTION.

Stated in general terms of ultimate legal effect jurisdiction of this Court is invoked on the grounds that this is a direct appeal from the final judgment and decree of a statutory three-judge court, sitting as the District Court of the United States for the Northern District of Ohio (R. 98), denying the appellants' prayer for relief, namely, that the order of the Interstate Commerce Commission be set aside and annulled and that the Court issue an order requiring the Interstate Commerce Commission to issue a certificate of public convenience and necessity to the Gregg Cartage & Storage Company and therefore within the jurisdiction of this Court by reason of the provisions of Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 93, par. 4); U. S. C. Title 28, Section 345 and also under Section 47(a) of the Title 28 U. S. C.

The facts of the case substantiating the foregoing general statement and showing the court's jurisdiction to attach mentioned, have been set forth at length in an Appellants' Jurisdictional Statement, heretofore filed in the District Court below, and heretofore printed by the Clerk of this Court, and an expanded, detailed statement of the same facts is set forth of necessity in the "Statement of the Case" appearing immediately following this statement in this brief. No useful purpose would be served by repetition of the statement of the jurisdictional facts, and, in the interest of brevity, we beg leave to omit restating them in this section of the brief, and invite the Court's attention to the immediately succeeding section hereof and to ask that it be read and considered as a part of our statement of the grounds upon which the Court's jurisdiction is invoked.

STATEMENT OF FACTS.

The Gregg Cartage & Storage Company originally started business in 1920 when Joseph Gregg commenced operating with a single truck. By 1925 the business had so increased that it was advisable to incorporate the company. In 1932 the company instituted interstate transportation operations and in 1934 registered under the Code of Fair Competition with National Recovery Administration. The interstate operations of The Gregg Cartage & Storage Company extended from St. Louis, Missouri to Boston, Massachusetts, and terminals were maintained in all the large cities along the various routes used by the company, including Cleveland, Ohio; New York City, New York; Detroit, Michigan; Chicago, Illinois; Pittsburgh, Pennsylvania; and Baltimore and Hagerstown, Maryland. (Complaint R. 1, 2.)

On February 12, 1936 The Gregg Cartage & Storage Company filed its application for a certificate of public convenience and necessity as provided for in Section 206-A of Part II, Interstate Commerce Act, 54 Stat. 923; 49 U. S. C. Sec. 306(a). The application was referred to William A. Maidens, an Examiner of the Interstate Commerce Commission, who conducted a hearing, and on December 17, 1937, found that the applicant was entitled to a certificate of public convenience and necessity under the so-called Grandfather's Clause of the Motor Carriers Act of 1935, the statute cited above, because "the applicant was, on June 1, 1935, and continuously since that time has been, in bona fide operation as a common carrier by motor vehicle * * *." (Complaint R. 2, 3; Report of Maidens, R. 14.) At the time of filing the application it had approximately two hundred twenty (220) trucks in operation, and in the year 1936 it had an income of approximately two million dollars freight revenue; delivered seven thousand five hundred cars of freight to one railroad.

For about one year prior to January 1, 1937, public liability and property damage insurance was carried with The Central Mutual Insurance Company of Chicago, Illinois. On or about December 31, 1936, The Gregg Cartage & Storage Company cancelled its insurance contract with that company because of rumors that the company was facing bankruptcy and was failing to settle claims of the Gregg Company arising from accidents which had occurred between October, 1935 and December 31, 1936, the period during which the Gregg Company was insured with the Central Mutual Insurance Company. (Testimony of Resnick, R. 25, 26.)

On or about January 11, 1937, the Central Mutual Insurance Company became insolvent and being an Illinois Corporation, under the laws of that state, the Department of Insurance assumed control, a receiver was appointed and any payment of claims ceased. The receiver by a circular letter advised all policy holde that he would not defend or take any further interest in cases against any of the assureds. January 1, 1937, the Gregg Company became insured with the Auto Mutual Insurance Company, paying advance premiums as required, and remained insured with that company until October 4, 1937, when a receiver was appointed for the Gregg Company. The policies with both companies were approved and accepted by the Public Utilities Commission of Ohio and the Interstate Commerce Commission. (R. 26.)

On January 11, 1937 when the Gregg Company received notice of the insolvency of the Central Mutual Insurance Company, it immediately turned over its entire file concerning claims covered by insurance with that company to its lawyers with instructions to "see what they could do with all the various causes that were pending that the Central Mutual had not taken care of." (Testimony of Resnick, R. 27.) After a thorough investigation and expenditure of a large amount of money for railroad fare and

employment of counsel in other cities, counsel for the Gregg Company estimated that the total amount of claims could be settled for between twenty and forty thousand dollars including counsel fees and other expenses. The Gregg Company faced no difficulty in discharging the ordinary obligations of the company; but the extraordinary obligations of paying advance insurance premiums to the Auto Mutual Company and the disposition of approximately one hundred seventy-five claims, many of which had matured into law suits, all of which should have been disposed of by insurance companies, overtaxed the resources of the company and the ingenuity of counsel. (Testimony of Leuck, R. 31.)

The Gregg Company had also been previously insured with the Monarch Insurance Company and Sun Insurance Company and had paid out to customers in order to hold their good will approximately thirty thousand dollars, the insurance companies having refused to pay the claims on technical grounds. (Cross examination of Leuck, R. 33.)

In spite of the extraordinary demands made upon it the Gregg Company continued its operations without diminution as a common carrier by motor vehicle. Officials of the company and counsel "finally reached the conclusion that in justice to the creditors and in the interest of sound public policy, the Gregg Company should ask for a receivership which would stay legal proceedings, except as permitted by the Court and under those circumstances we could operate." (Testimony of Leuck, R. 31.)

On October 4, 1937, upon application to the Common Pleas Court of Cuyahoga County, Ohio, an operating receiver was appointed and took possession of the business and the assets of the Gregg Company on the morning of October 5, 1937. The receiver had authority to and did continue the operations of the Gregg Company. He accepted no new business, but took care of the business which the company already had, taking out individual policies of in-

surance on each load of freight moved. (Testimony of Leuck, R. 40.)

On October 5, 1937, an involuntary petition in bankruptcy was filed in the District Court of the United States, for the Northern District of Ohio, Eastern Division, and on October 27, 1937, The Gregg Cartage & Storage Company was adjudicated bankrupt by the District Court of the United States. On October 30, 1937, a custodian receiver, without authority to operate, was appointed. (Testimony of Leuck, R. 39.) The receiver took all necessary steps to protect all of the assets of the company, including its operating rights, but did not continue any operations of the company, and on November 13, 1937, the bankruptcy receiver filed an application to sell the operating rights of the bankrupt corporation to the Northeastern Transportation Company, which sale was confirmed by the District Court on December 6, 1937. (Intervener's Bill of Complaint, R. 91, 92.)

The Northeastern Transportation Company on January 7, 1938, filed with the Interstate Commerce Commission its application for substitution as applicant in the proceedings then pending before the Interstate Commerce Commission and made repeated requests to the Commission for action thereon, which requests were ignored. (Intervener's Bill of Complaint, R. 92.) The application for substitution was denied on June 13, 1940, after the institution of the action before the statutory three-judge court. (Answer of Interstate Commerce Commission to Intervener's Bill of Complaint, R. 95, 96.)

After the sale of the rights to Northeastern Transportation Company, certain operations were started by it preparatory to commencing business, but these operations "were suspended at the urgent request of Roy M. Snetzer, District Director of * * * the Interstate Commerce Commission and his assistant, William Hubbard." (Intervener's Bill of Complaint, R. 92; Testimony of Leuck, R. 32, 48.)

On April 8, 1938, the Interstate Commerce Commission referred the application for certificate of public convenience and necessity to Examiner A. F. Borroughs for further hearing which was held on May 4, 1938, the issue in question being the interruption of service which had taken place subsequent to the bankruptcy. (R. 25.) All the evidence at the hearing was offered by the applicant although certain protestants were present and cross examined witnesses. (R. 25-50.)

June 29, 1938, the Examiner filed his report wherein he found that the interruption of service was not within the control of the applicant and recommended an order for the issuance of a certificate of public convenience and necessity. (R. 51-58.) On November 14, 1938, Division 5 of the Interstate Commerce Commission found that the interruption of service over which applicant had control within the meaning of Sections 206(a) and 209(a) of Part II, Interstate Commerce Act, Commissioner Lee dissenting.

December 12, 1939, upon review by the full Commission the report of Division 5 was sustained, Commissioners Lee, Porter, Caskie, Alldredge and Splawn dissenting.

On June 7, 1940, The Gregg Cartage & Storage Company filed its complaint appealing from the Order of the Interstate Commerce Commission to the United States District Court for the Northern District of Ohio, Eastern Division. On September 20, 1940, the Northeastern Transportation Company, the successor in interest of The Gregg Cartage & Storage Company, filed its intervening complaint in the United States District Court. On May 19, 1941, the complaint of The Gregg Cartage & Storage Company and the intervening complaint of the Northeastern Transportation Company was dismissed by Judges Allen, Jones and Wilkin after a hearing was had on January 29, 1941. The petition of appeal of The Gregg Cartage & Storage Company and the Northeastern Transportation Company to this Court was filed on July 14, 1941. This Court noted probable jurisdiction on October 13, 1941.

SPECIFICATION OF ERRORS TO BE URGED.

The District Court erred:

1. In entering a decree affirming the order of the Interstate Commerce Commission.

2. In holding that the Commission, upon the facts, acted in accordance with the law in issuing its order denying plaintiff's application for a certificate as an interstate motor carrier under the Grandfather's Clause of the Motor Carrier Act of 1935.

3. In holding, upon the facts, that approximately 175 claims for personal injury and property damage during the year ending December 31, 1936, were evidence of poor business management and were within the control of this plaintiff, the Gregg Cartage & Storage Company, under Section 206 of the Motor Carrier Act of 1935. (U. S. C. Title 29, Section 306.).

4. In holding that, upon the facts found by the Commission's report of June 29, 1938 (Examiner A. F. Borrough's report) that the bankruptcy was within the control of the bankrupt as the word "control" is used in Sections 206A and 209A (U. S. C. Title 29, Sections 306A and 309A) of (fol. 149) the act and that the bankrupt is responsible in law for the consequences that flow from the adjudication.

5. In holding that the so-called "Grandfather" provisos of Sections 206A and 209A of the Motor Carrier Act (U. S. C. Title 29, Sections 306A and 309A) which were the provisions of the Act upon which the plaintiff's, the Gregg Cartage & Storage Company, applications for operating rights as a carrier were based, require continuous operation until the grant of the applications.

6. In holding that the interruption of services in the operations of the plaintiff, the Gregg Cartage & Storage Company, was an interruption of services over which the company had control within the meaning of Sections 206A

and 209A of the Motor Carrier Act of 1935 (U. S. C. Title 29, Sections 306A and 309A).

7. In holding that Section 212A of the Motor Carrier Act of 1935 (U. S. C. Title 29, Section 312A) applies only to a carrier whose application for operating rights has been granted and does not apply to one whose application is pending before the Commission.

8. In holding that the Commission's order was supported by evidence.

9. In holding that the Commission's construction of the pertinent provisions of the Act is correct.

10. In holding that the discrimination created under Section 212A of the Act (U. S. C. Title 29, Section 312A) is constitutional.

11. In holding that the Commission had not exceeded its discretion in that it went beyond the mere fact of bankruptcy and upon exhaustive hearing determined that the bankruptcy was not due to any failure on the part of the applicant and then decided arbitrarily and against the evidence and upon strictly legalistic grounds that any bankruptcy under the Motor Carrier Act will be held to be the result of bad business management.

12. In overruling the plaintiffs' and interveners' application for conclusions of law.

13. In that as to each special finding of fact the record does not disclose substantial, competent evidence to support said finding.

14. In granting the application for findings of fact and conclusions of law submitted by the defendants, the United States of America and the Interstate Commerce Commission.

15. In affirming that part of the Interstate Commerce Commission's report wherein the said Commission refused

or failed to make a finding as to the time when the "grandfather" rights expired.

16. In finding that the Commission acted in accordance with the law in failing to act upon the application for substitution filed on behalf of the Northeastern Transportation Company and finding that the continued interruption of service was due to the applicant, the Gregg Cartage & Storage Company.

SUMMARY OF ARGUMENT.

I.

The decision of the Commission and the decision of the District Court upholding that decision are both contrary to the facts of record. Since the Commission held a hearing on the question of interruption of service, it was bound to decide according to the evidence. It has failed to do so here, and the decision is, accordingly, contrary to the evidence and should be set aside as an order entered in plain disregard of, and contrary to the facts, of no legal effect.

II.

The Commission by its decision of this case has interpreted Section 212-A of Part II of the Interstate Commerce Act (49 U. S. C. 312-A) in such a way that there has been a discriminatory, and hence unconstitutional, construction of the Act. The Commission has divided applicants for "grandfather" rights into two classes. In its application of this Statute, the first group are those applicants who had their applications acted upon. These applicants are entitled to receive the thirty day notice. The second group are those whose applications were filed seasonably but who have not as yet had their application acted upon and who the Commission has ruled are not entitled to receive the thirty day notice. This affects a discrimination in favor of the one group which is unwarranted and unconstitutional.

III.

The Commission and the Court below have erroneously construed Section 206-A of Part II of the Interstate Commerce Act (49 U. S. C. 306-A) as requiring continuous operation by an applicant for a certificate of convenience and necessity under the "grandfather" clause from the date of June 1, 1935 until the date of action by the Commission on the application. That section of the Act should be construed as requiring operation only from June 1, 1935 to the effective date of the Act.

IV.

The Commission and the Court below should have decided when the alleged expiration of "grandfather" rights took place. The determination of when the "grandfather" rights expired is an essential part of the reasoning process by which it was determined that the rights had expired. To find merely that the rights had expired without stating when is arbitrary.

V.

The facts disclose that the appellants had no control over the causes of the bankruptcy, therefore no control over the interruption of service which occurred after the bankruptcy. After the adjudication of bankruptcy had been entered and the bankruptcy referee took charge, the appellants had no control over the receiver's failure to operate because the receiver, and the Bankruptcy Court, had exclusive control over the bankrupt's affairs; its officers and stockholders had none. The interruption of service was actually due to the action of the Interstate Commerce Commission which refused to act upon the various applications before it.

VI.

In reaching this decision, the Commission erroneously construed the provision of the bankruptcy law and so interpreted that law as to result in a defeat of its primary objectives and purposes as those objectives and purposes have been stated by this Court. The decision with reference to the questions of bankruptcy law involved is based upon doubtful authority and upon the case of *Central Trust Company v. Chicago Auditorium Association*, 240 U. S. 581, which has been superseded by an Amendment to the Bankruptcy Act (Section 70-B), and should, therefore, be overruled by this Court.

VII.

The decision of the Commission is arbitrary and discriminatory as applied to the appellants here because it fails to accord to the appellants the benefit of prior decisions which have held that other applicants, similarly circumstanced, were, nevertheless, entitled to a certificate of public convenience and necessity because the interruption of service was not within the control of those other applicants. In those other cases, questions of financial difficulties, attempt to abandon operations, action by the Commission or its representative, and involuntary bankruptcy were all involved.

ARGUMENT.

POINT I.

THE RECORD DOES NOT DISCLOSE A RATIONAL BASIS FOR THE CONCLUSIONS APPROVED BY THE COMMISSION.

This part of the Brief is devoted to demonstrating that the record in the case does not justify or support the conclusions reached by the Commission. The fact that this part of the Brief is being written is perhaps due to an excess of caution, since it would appear that this is no longer in dispute. The Government will very likely take the position that the support depended upon in the record derives from the fact that the record shows suspension of operations was incident to bankruptcy. Or to state it in the language used by the District Court, its position is defined as follows:

> "The Commission, however, declined to look beyond the bankruptcy. It held bankruptcy to be a matter within the control of the applicant without considering the causes of bankruptcy. Such a ruling by the Commission is the adoption of a proper administrative policy or the application of a rule of law, and in either case it seems to be a proper exercise of its authority and not subject to change by this court." (R. 99.)

The administrative policy approved in the above Memorandum Opinion, if it may be properly designated as such, had not been adopted by the Commission prior to the instant case. At any rate it was not applied to this case until after testimony had been taken looking beyond the bankruptcy and the Commission, through its Examiner, had determined that the bankruptcy was not within the control of the appellant to prevent. An examination of cases which have arisen since discloses that during its subsequent existence contradictions and uncertainties characterize its application to such a degree that it can hardly be considered as actually being a rule or policy. These cases have been collected and are submitted to the Court in Appendix B.

The bankruptcy of the appellant occurred while its application under the "Grandfather's Clause" was pending. There was a brief suspension of operations due to the bankruptcy. As a result of the receipt of protests based upon this suspension, the "Grandfather" proceeding was reopened and an Examiner dispatched to Cleveland to take testimony.

The hearing was held on May 4, 1938 before Examiner A. F. Borroughs. Before any testimony was presented the Examiner ruled as follows (R. 25):

> "The order of the Commission doesn't designate specifically what the issues are, as you know, counsel. However, it is the Examiner's understanding, and he now rules, that the evidence involved at this time and the issues which are to be considered here relate to the question of interruption of service as a result of a receiver of the applicant in the two dockets which are before the Examiner at this time. Your testimony and evidence will relate then to the interruption of service. With that understanding, you may proceed."

The testimony of witnesses was then received and an extensive hearing conducted. (R. 25-50.)

Had there been in effect at the time of the above hearing some administrative rule or policy similar to the one now being urged, there would have been no point in holding a hearing at all. The public records of the United States District Court and the State Court of Cuyahoga County, Ohio, would have disclosed on examination that bankruptcy had taken place and that the Federal Receiver had not been authorized to operate the business. Had the so-called rule then been applied to the above facts, a finding would have resulted to the effect that the suspension was within the control of the appellants to prevent.

Since a hearing was held and testimony taken which constitutes all of the evidence in the Record on the question

of control, we feel justified in briefly calling attention to the evidence submitted.

In the first place none of the protestants offered any evidence.

The evidence throughout the hearing uniformly and consistently supports the inference that suspension of operations was beyond the control of the appellant to prevent. This was the finding of the Examiner who conducted the hearing. (R. 51.) It was the only finding that reasonable minds could arrive at from the evidence. We strongly urge that an administrative policy which can be utilized by an Administrative Board for the purpose of disregarding entirely the evidence in the case should not be sustained. In this case there was no conflicting evidence to weigh. Had the protestants been in possession of any evidence of probative force, we assume it would have been offered. The injustice of this form of procedure is aptly described in the dissenting opinion of Commissioners Alldredge and Splawn.

> "The finding of the majority that such interruptions are within the carriers' control is effected through employment of a legal fiction, based upon the rule expressed by division 5 as follows:
>
> And, notwithstanding that the plight of the insolvent may be ultimately traced to misfortune rather than negligence or wrongful conduct, it is evident that the policy disclosed by the Bankruptcy Act is to presume conclusively that the conditions which precede the adjudication in bankruptcy are within the control of the insolvent.
>
> I doubt the wisdom of our adopting this legalistic rule for application in cases of this kind. It seems to me that we should look behind the cold facts of bankruptcy in order to learn the true facts surrounding an interruption of a carrier's operations by operation of the bankruptcy laws. Where, as appears in this case, the receivers have acted with diligence to preserve the bankrupt's estate, the bankrupt carrier could not in fact have reasonably avoided its misfor-

tunes, and we have failed to cooperate with one of the receivers and a company which was ready and anxious to take over and operate the business by refusing to consider and permit the transfer of whatever rights existed at the time of sale, I cannot subscribe to a decision which wipes out all operating rights in existence at the time bankruptcy occurred." (R. 81.)

In a prior dissenting opinion by Commissioner Lee, while the matter was pending in Division 5 of the Commission, the following statement appears:

"There is no evidence of mismanagement or other dereliction on the part of applicant." (R. 65.)

This statement still stands unchallenged.

In a fairly recent case the precise question involved here was being considered. It was the case of *Rochester Telephone Corporation vs. United States*, 307 U. S. 123. The Court's opinion in part reads as follows (page 146): "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The summary of facts on page 144 reveals that considerable evidence was introduced. The issue of fact was control of one corporation by another. The evidence was conflicting. One contention very strongly urged was that ownership of only one-third (⅓) of the stock by the alleged controlling company showed conclusively absence of control. This fact had been weighed against other circumstances, including a voting trust agreement. At any rate it is clear that the record provided a rational basis for the conclusions reached.

The opinion in this case refers to two other cases which discuss the question of judicial review of administrative determinations.

In *Swayne & Hoyt vs. United States*, 300 U. S. 297, the matter of steamship rates was under consideration. In reading the opinion, one finds on page 300 the following:

"Thereupon the Secretary * * * made an order suspending the schedules and directing a second hearing * * *. On this hearing new evidence was introduced and relevant portions of the evidence adduced on the previous hearing were spread upon the record."

The view of the Court as expressed in the syllabus is as follows:

> "Page 5—Syllabus. A determination by an administrative Agency to whose informed judgment and discretion Congress has committed the determination of questions of fact, on the basis of which it is authorized to make administrative orders, will not be set aside by the Courts if there is evidence to support it, even though upon a consideration of all the evidence the Court might reach a different conclusion."

It is apparent that it was a case in which the record supplied a rational basis for the conclusions reached.

The other case is *Mississippi Valley Barge Line Company vs. United States*, 292 U. S. 282. A controversy had arisen between land and water carriers regarding competitive rates. "There were full hearings of the parties in interest with testimony and argument." (Opinion, page 285.) "In this instance the care and patience with which the Commission fulfilled its appointed task are plain even to the casual reader upon the face of its report." (Opinion, page 287.)

It was held that the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the Interstate Commission.

Once again it appears to be a case in which the record supplied a rational basis.

This Court once said that "only questions affecting constitutional power, statutory authority and the basic prerequisites of proof" can be raised in a case of this kind.

Is there not a clear violation of basic evidentiary requirements involved in a conclusion that disregards a rec-

ord which supports only one finding and that opposite to the one reached?

Should there not be some question as to whether authority exists for the Commission to invade a field in which the Courts move with exceeding care, by establishing a presumption and in addition making it conclusive. The legal fiction, administrative rule or presumption utilized here, is in addition to those the law has previously recognized and this despite a record that consistently refutes it from beginning to end.

The Courts will not define presumptions in such manner as to imply superiority over established facts. Where facts appear presumptions recede. *Clement v. Packer*, 125 U. S. 309; *Lincoln v. French*, 105 U. S. 614; *Packard v. O'Neil*, 45 Idaho 427, 262 P. 881, 56 A. L. R. 317.

A fair analogy would be that of a Court of Equity calling a jury to pass upon an issue of fact and then disregarding the verdict and the evidence by invoking a presumption hitherto unknown to the law and upon that basis overruling the jury.

Concluding on this point, may we again point out that there is no showing in the record of mismanagement, of a high accident rate or any defect whatsoever in any manner in which the company conducted its business. (Page 54, Record.) The Insurance Company causing the receivership was on the approved list of the Interstate Commerce Commission and the policy was on file with the Commission. A fair analysis of the facts shows, therefore, that the result reached by the Commission could be obtained only by completely disregarding the evidence in the case and relying upon a legalistic rule which has no rational relation to the evidence.

POINT II.

THE ACT OF THE COMMISSION IN WITHHOLDING FROM THE APPELLANT BENEFITS UNDER SECTION 212A, PART II, INTERSTATE COMMERCE ACT (49 U. S. C. SEC. 312A) WAS ARBITRARY, DISCRIMINATORY AND UNCONSTITUTIONAL.

On October 14, 1937 the Receiver of The Gregg Cartage & Storage Company filed a petition with the Commission praying for authority to suspend operations without prejudice to its operating rights under the "grandfather" clauses of the Act. At that time Section 212-A, of Part II of the Interstate Commerce Act, in its material portion, provided as follows:

> "Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until terminated as herein provided. Any such certificate, permits, or license may, * * * upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for wilful failure to comply with any provisions of this part (chapter), or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply, within a reasonable time, not less than ninety (90) days, to be fixed by the Commission, with a lawful order of the Commission, * * * or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit or license found by the Commission to have been violated by such holder."

Later this Section was re-enacted to provide for thirty days' notice instead of ninety days' notice.

The refusal of the Commission to apply this Statute to the applicant appears upon examination to have been arbitrary, discriminatory and unconstitutional.

The Commission has divided applicants for "grandfather" rights into two classes in its application of Section 212-A. The first group are those whose applications have been acted upon. They are entitled to receive the thirty day notice. The second group are those whose applications were filed seasonably, but have not as yet been acted upon and who, the Commission has ruled, are not entitled to receive the thirty day notice. The dissenting opinion of Commissioner Lee takes sharp issue with this discriminating procedure.

> "Congress foresaw the impossibility of an immediate determination of all 'grandfather' applications and, to care for this situation, provided in section 206(a) that applicants for 'grandfather' certificates might continue their operations until their applications had been determined. The right thus given to continue their operations is subject to no restriction, and I do not believe that Congress intended that 'grandfather' rights during such period should be any more liable to termination because of these temporary interruptions in operations than are such rights after the issuance of a certificate." (Dissenting Opinion of Commissioner Lee, R. 69.)

Congress provided for continued operations while the application was pending in the following manner:

> "Title 49—Section 306 U. S. C. Pending the determination of any such application the continuance of such operation shall be lawful."

Thousands of applications for "grandfather" certificates were filed with the Commission. On November 14, 1938, three years after the Statute was enacted, many of the applications were still undetermined. (R. 68.)

On December 12, 1939, the Commission had been unable to pass upon all of the nearly ninety thousand "grandfather" applications filed with it. (R. 78.)

It has therefore come about that the consequences of interruption of service differ in the two classes. The Com-

mission has recognized the injustice and inequality involved in this situation and is hopeful that this regrettable situation will pass away when all of the "grandfather" applications have been disposed of. It expresses satisfaction that only a few cases of unjust consequences have come to its attention. (R. 79.)

The dissenting opinion of Commissioners Lee, Porter and Caskie views the matter somewhat differently:

> "An interpretation which results in such inequities should be indulged only where unavoidable, which is not the case here. As stated by the majority, it is a well-recognized principle of statutory construction that a statute will be presumed to speak as of the date of its taking effect, unless a contrary intention appears therein, but it is concluded that the fact that the act contemplates that some of its sections may become effective on different dates evidences a contrary intention. I do not think so. There is nothing illogical in interpreting the act as speaking, as to its several sections, as of the respective dates such sections became effective, and such an interpretation would result in no confusion. So interpreted, the words 'was in bona fide operation * * * on June 1, 1935, * * * and has so operated since that date,' in the 'grandfather' clause of section 206(a), would mean operation from June 1, 1935, to October 15 of that year. Under such interpretation all 'grandfather' applicants would receive equal treatment. In order to secure a certificate, each would have to show operations over the same period, and there would be no disparity as to termination of operating rights by reason of interruptions in operations." (R. 80.)

The dissenting opinion of Commissioners Alldredge and Splawn (R. 80) recognizes the fact that the majority decision will wipe out the operating rights of a large number of motor carriers who have had the misfortune to become bankrupt during the long period since June 1, 1935.

The discrimination complained of operates two ways. It favors those who have been fortunate enough to have

their application considered by making available to them the thirty day notice. It favors them again by requiring a showing of continuous operation for a less period, frequently several years, than what was required of those whose applications are still pending.

It is difficult for a fair-minded person to be convinced that the Commission has no alternative except to adopt a harsh and arbitrary rule which results in the degree of discrimination herein described.

POINT III.

IT IS ERROR TO CONSTRUE SECTIONS 206A AND 209A OF PART II OF THE INTERSTATE COMMERCE ACT AS REQUIRING CONTINUOUS OPERATION FROM JUNE 1, 1935, TO THE DATE OF THE GRANT OF THE APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

A.

The construction of the Act by the Interstate Commerce Commission and District Court is contrary to the principle that the intent will be gathered from the words used.

The pertinent parts of Section 206A for the purpose of this point are as follows:

"* * * if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time except in either instance as to interruptions over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings * * *"

if application is made within a certain time. (Appendix, *post* p. 54.)

The Commission and the court below have held that this section requires that an applicant for a certificate (or if a contract carrier for a permit under Section 209(a)) must have been in continuous operation from June 1, 1935, until the time of the issuance of the certificate. The specific question involved is whether or not "since that time" means that the service must be continuous.

There is no warrant in the statute for interpreting "and has so operated since that time" as requiring continuous operation.

This Court has recently stated the prevailing doctrine concerning construction of statutes in *United States v. American Trucking Association*, 310 U. S. 534. Speaking through Mr. Justice Reed the Court stated that the function of the courts was easily stated and that function "* * * is to construe the language so as to give effect to the intent of Congress." (p. 542.) Continuing the Court said:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning." *Taft v. Commissioner of Internal Revenue*, 304 U. S. 351, 359; *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 89; *Wilbur v. United States*, 284 U. S. 231, 237; *Crooks v. Harrelson*, 282 U. S. 55, 60; *United States v. Missouri P. R. Co.*, 278 U. S. 269, 278; *George Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245, 253; *Caminetti v. United States*, 242 U. S. 470, 490; *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 199.

It takes a great deal of ingenuity to read "continuous" or "continuously" into the phrase since that time when it is considered that those words were expressly eliminated

by the Congress in drafting the legislation. In explaining the statute to the Senate, Mr. Wheeler, Chairman of the Interstate Commerce Committee of the Senate, said in explaining the meaning of Section 206:

> "In lines 6 and 8, page 23, the words 'continuously' and 'continuous' have been omitted in view of the objection that operators who have temporarily ceased operations for reasons beyond their control may be deprived of the benefits of the grandfather clause." 79 Cong. Rec., Part 5, p. 5654.

We submit that words which have been deliberately omitted are just as persuasive of the meaning of a statute as are the words which have been used, and that no regulating body has authority to read the words into the statute when they have been stricken out by the legislature.

B.

The construction of the statute adopted here ignores the rule that a statute speaks as of the date of its taking effect.

The Commission has construed the statute as requiring continuous operation from June 1, 1935, to the date of the granting of the permit.

The Commission stated that the rule requiring a statute to be construed as speaking from its effective date was "well recognized" but that since the Motor Carrier Act contemplated that different sections of the Act take effect on separate dates, a contrary intent was indicated by the Congress. To decide otherwise, so the Commission holds, is required in order to avoid absurd or futile results, and in reliance upon this construction the Commission cites *McDonald v. Thompson*, 305 U. S. 263; *Welch v. New Hampshire*, 306 U. S. 79; *Eichholz v. Missouri Public Service Commission*, 306 U. S. 268. These cases, so the Commission says, have clearly announced "the underlying principles that our actual action rather than the grant"

of the statutory power to take the action is the determinative factor in proceedings under the Motor Carrier Act * * * ." (R. 78.)

The above cited cases do not require such a construction, nor do they support the contention of the Commission, as the questions there decided are not the ones in this case. *McDonald v. Thompson* is authority for the proposition that where a carrier has operated in violation or defiance of state laws, he has not been in "bona fide" operation, and, therefore, is not entitled to the exemption granted by the proviso in Section 206(a). In order that nothing more might be read into that case this Court specifically said that it was not considering any other question presented.

H. B. Welch Co. v. New Hampshire, 306 U. S. 79, merely held that this Court would not construe Section 204(a) of the Motor Carrier Act as indicating that Congress intended that state regulatory measures which regulated traffic and safety on state highways should be superseded by regulations of the Interstate Commerce Commission prior to the effective date of said regulations. In other words, the court held the mere grant of the power to regulate would not supersede the state regulations, and that such regulations would not be superseded until the Commission had actually issued the regulations. That case, however, is no authority for the proposition advanced by the Commission.

Eicholz v. Missouri Public Service Commission, 306 U. S. 268 like *Welch v. New Hampshire, supra*, was not concerned with the effective date of the statute. The question there was whether or not upon application to the Interstate Commerce Commission for certificate of public convenience and necessity, and during the pendency of that application, the State Public Service Commission was deprived of jurisdiction over intrastate traffic carried by the applicant. The decision of this Court was that the filing of the application before the Interstate Commerce Commis-

sion did not deprive the state body of its jurisdiction, a decision which few would quarrel over, but which has no application to the question herein considered.

This Court has consistently held that statutes shall be construed prospectively and this holding has always been in emphatic language. The most recent expression on the subject is found in *Hassett v. Welch*, 303 U. S. 303, where at p. 314 through Mr. Justice Roberts the court said:

> "* * * a law is presumed, in the absence of clear expression to the contrary, to operate prospectively"

citing *United States v. Heth*, 3 Cranch 399, 413; *Reynolds v. McArthur*, 2 Pet. 417, 434; *Shurat v. Doyle*, 258 U. S. 529; *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, 162.

There is no clear expression to the contrary in this statute nor would the construction involve absurd or futile results. It would, as is set forth elsewhere, result in a construction which would place each applicant on an equal basis and should have been adopted.

POINT IV.

THE COMMISSION SHOULD HAVE MADE A FINDING AS TO THE TIME WHEN THE RIGHTS EXPIRED.

The Commission held that it was useless to "speculate upon the question whether the 'grandfather' right expired before or after the sale." (R. 75.) This, we submit, is a failure to make a most important finding. Determining the time is not speculation, it is an integral part of the mental process of forming the judgment that the rights had expired.

The Commission if it reached the conclusion it did by actually considering all of the elements involved, it must have, somewhere in its process of reasoning, reached a point where it knew the rights expired. That they were once in existence cannot be denied. The Commission holds

that the rights expired and if this is true, then somewhere in the record in this case an event took place which, when considered in conjunction with the statute, caused the rights to cease to exist. That event must have been known to the Commission or else it could never have reached the conclusion it did and if it knew what the event was, the Commission also knew when the event happened.

Failure to state when the event occurred makes a fatal break in the Commission's chain of reasoning; it suggests an arbitrary finding to support the decision the Commission had determined to reach.

POINT V.

THE INTERRUPTION OF SERVICES WAS NOT WITHIN THE CONTROL OF THE APPLICANT.

A.

The causes of the bankruptcy were not within the control of the applicant.

The report of Division 5 of the Commission, the report of the full Commission on reargument, and the decision of the court rest upon two fundamental misconceptions. The first of these is that the insolvency and resulting bankruptcy were caused either by overt acts of The Gregg Cartage & Storage Company or by its failure to prevent the happening of certain events because of failure to act in accordance with sound business judgment. Neither point of view finds support in the record.

The report of Division 5 states unequivocally that on June 30, 1937, just three months prior to the application in the state court for the appointment of a receiver to continue the operation of the business that the company was solvent. (R. 63.) Division 5 then finds that at the time the receiver was appointed by the bankruptcy court and took charge, that is on October 30, 1937, the applicant clearly was insolvent. (R. 63.) For a going concern to

pass from solvency to insolvency in three months' time requires an explanation. It does not just happen. There must be a cause or causes and the determination of the cause or causes solves the question as to whether or not the insolvency was within the control of the insolvent.

There was no change in management. The president and active head of the corporation was the same man who had brought the business from a one-truck operation in 1920 to one which did a yearly business of $2,000,000.00 in the year prior to the insolvency. There is no showing in the record that there was any diminution in the amount of freight. There is no evidence of any sudden great increase of competition with resultant loss of business to competitors. There was no defalcation by employees. No sudden economic depression which unfavorably affects all members of the business world supervened. In fact this insolvency took place in 1937 which was the most prosperous year of the last decade. It is thus seen that none of the usual causes of financial difficulties were present, and no facts were produced by protestants at either hearing to show dereliction or bad judgment on the part of the management. In view of the fact that the Commission and the courts must act upon the records which are developed before them because they have no other method of obtaining information on which they may rely, it follows that the facts developed on the record by the applicant's testimony are the only facts upon which a decision may be made as to whether or not the insolvency was caused by the acts of omission of the insolvent or whether it was caused by other factors. Repeated decisions of this Court forbid speculation as to what facts might have been adduced; the decision must rest on record facts.

Counsel believe that they have fully stated in narrative form the gist of the testimony given at the hearing before Examiner Borroughs, this being the hearing which was held after the insolvency. This is set forth in the Statement. (*Ante*, pp. 3 to 7.)

It discloses that The Gregg Cartage & Storage Company carried insurance with three different companies, such insurance being carried in the exercise of sound business judgment and in conformity with the requirements of the regulating bodies having jurisdiction over the business conduct of the carrier. That insurance was carried for the purpose of protecting the Gregg Company from the legal liability flowing from claims which, perforce, arise from time to time in the conduct of motor carrier operations. It is common knowledge that it is impossible to engage in continuous operation of motor vehicles upon the public highways without eventually having a certain number of accidents. To repeat, the insurance was carried for the purpose of eliminating or mitigating the legal liability flowing from such actions. All of the policies carried by The Gregg Cartage & Storage Company were carried with companies which were approved by the Public Utilities Board and the Interstate Commerce Commission, the latter being a regulating body which this Court has repeatedly characterized as "a permanent expert body." (*Board of Trade of Kansas City, et al. vs. United States, et al.*, decided January 5, 1942, O. T. 1941, No. 143.) Carrying insurance in a company approved by such a body would be the exercise of a sound business judgment; indeed, the insurance company must be one approved by the Interstate Commerce Commission. One of the companies, The Central Mutual Insurance Company, however, went bankrupt. Prior to the time it went bankrupt it neglected or failed either to disprove or to settle claims against the Gregg Company; claims which the Gregg Company had every right to expect the insurance company to disprove or settle. The record discloses that as soon as the Gregg Company realized that this company was fast nearing insolvency it canceled its insurance policy with The Central Mutual Insurance Company and placed its insurance with another approved company. The Gregg Company wasted no time

in bemoaning its misfortune because of the number of unsettled claims which it inherited from Central Mutual's insolvency. It immediately turned over its entire file covering these claims to its attorneys who, according to the testimony, applied themselves with great assiduity to working out some mode of settlement of the claims. Certainly their efforts were not all in vain because for the first six months of 1937 the company was able to continue in operation and remain solvent.

The claims which the Central Mutual should have disposed of were not the only insurance troubles which the Gregg Company had. Insurance which it had placed with the Sun Insurance Company and the Monarch Insurance Company, both strong companies and still in operation, had failed to provide the protection which the company thought it had purchased by payment of premiums. Claims were filed against the Gregg Company, and the Sun and Monarch Insurance Companies, relying upon technicalities, refused to pay the claims. The claimants, customers of the Gregg Company, clamored for payment and, relying upon the financial soundness of the insurance companies, the Gregg Company paid some $30,000.00 worth of these claims, intending to force reimbursement from the insurance companies because of their refusal to pay, based upon bare technicalities. No one with business experience will dispute that the payment of these claims, even in such large sums, was in the exercise of a sound business judgment. No motor carrier can long remain in business who is engaged in constant altercation with shippers over the payment of claims where such claims are just and where refusals to pay them are based upon mere technicalities.

As stated above no other explanation of the insolvency is disclosed by the record. If protestants knew of any such evidence, it is difficult to believe they would not have produced it. While the cross examination which was made of witnesses was openly hostile, the cross examination failed

to disclose any lack of business judgment on the part of the Gregg Company. It is, therefore, submitted that any attempt to prove that the insolvency and the bankruptcy were caused by any acts or omissions by the Gregg Cartage & Storage Company fails, nor is it possible to charge the company even with mere mistake in judgment in applying for an operating receivership in the state court. The purpose in so applying is plainly set forth in the testimony of Mr. Leuck, which was to place the affairs of the company in the hands of a receiver who would continue operations, and at the same time, the company being under the supervision of the court, a stay of legal proceedings could be secured, except those which the court would permit. Thus, the company would be able to continue its efforts to settle the many claims which were being pressed for payment. Operation of the business and a temporary cessation of litigation were essential to the continued existence of the company. The state receivership would have established both. The Gregg Company had the bankruptcy forced upon it over its "strenuous protest." (R. 37.)

B.

Events Subsequent to the Appointment of the State Receiver Were Not Within the Control of The Gregg Cartage & Storage Company in Any Sense.

The report of Division 5, the report of the whole Commission and the judgment of the court reveal a continuing misconception on the part of those responsible for each decision. This misconception rests upon the seeming assumption that after the appointment of both the state and bankruptcy receiver the Gregg Cartage & Storage Company was in control of the company and could decide whether or not operations should continue. This, of course, is entirely erroneous. Division 5 at page 64 of the record states as follows:

"In our opinion the discontinuance of operation by applicant due to its insolvency and resulting in voluntary bankruptcy is not the kind of interruption in service within the meaning of the exception."

(The applicant never discontinued operation. It was in operation on the day the state receiver was appointed and its operations were continued by the state receiver until the bankruptcy receiver took over.)

"Prior to such bankruptcy it had full control of its operation and methods of conducting its business, including the selection of insurance companies to protect it against damage and other claims."

(No mention is made of the fact that this selection of insurance companies must have the approval of the Commission.)

"It is presumed to know that if it fails to conduct its business in such a way as to provide for its obligations incurred by operation, proceedings in bankruptcy may be instituted against it. Such proceedings, when instituted, are the natural consequence of its voluntary acts and business methods, and where they prevent the continuance of operation, either by the motor carrier or a receiver, they are directly due to the voluntary acts of motor carrier which leads to the bankruptcy. It is clear that all the 'acts of bankruptcy' enumerated in the Bankruptcy Act as grounds for a petition in involuntary bankruptcy are so framed as to describe a voluntary action. And, notwithstanding that the plight of the insolvent may be ultimately traced to misfortune rather than negligence or wrongful conduct, it is evident that the policy disclosed by the Bankruptcy Act is to presume conclusively that the conditions which precede the adjudication in bankruptcy are within the control of the insolvent."

(Bankruptcy proceedings are not always the natural consequence of the voluntary acts and business methods and Division 5 so recognizes when it says "that the plight of the insolvent may be ultimately traced to misfortune rather than negligence or misconduct.")

With reference to the discontinuance of operations after the bankruptcy, Division 5 said also on page 64:

"In the instant case, the federal court receiver made no attempt to continue the motor carrier operations of applicant. While he apparently did not have such authority under the order appointing him, the law is well settled that he could have requested a grant of such authority. He did not do so, however, and devoted his efforts to preserving and liquidating applicant's assets for the benefit of creditors. Consequently, so far as this record shows there is no indication that he desired to continue the applicant's former motor carrier operations in whole or in part. Rather, it appears from his acts that he had no intention of continuing motor carrier operations so as to preserve any operating rights which the bankrupt estate might have had under the Act, and that he intended to abandon all such operations."

The full Commission stated as follows (R. 75):

"The attempted sale, of course, was ineffective without our approval and in no wise impaired the legal ability of the receiver to continue the operations until that approval was obtained. Hence the breach in the continuity of operations is to be ascribed to the bankruptcy for the period after as well as before the sale. Our holding in abeyance the application for approval had no significance or effect upon the crucial fact that no operations of any kind have been conducted from the time the receiver in bankruptcy took charge, and it is useless to speculate upon the question whether the 'grandfather' right expired before or after the sale.

"While the parties seem to have acted with reasonable diligence in pressing forward the proceedings necessary to the sale of the operating rights, they failed to preserve the existence of the subject matter of the sale by maintaining the continuity of the actual operations after every necessary preliminary had been accomplished."

But the acts of the bankruptcy receiver are not those of the bankrupt. The bankrupt in this case had lost con-

trol of its affairs when the state receiver was appointed, a month before the bankruptcy receiver was appointed.

It is needless to extend the length of this brief by a long discussion of the rights, powers and liabilities of receivers and of the powers and jurisdiction of bankruptcy courts, but a brief review of the holdings of this Court will serve to demonstrate the errors of the Commission and the court below.

As to the powers over administration of bankrupt estates this Court recently said through Mr. Justice Black in *Thompson v. Magnolia Petroleum Company*, 309 U. S. 478 at 483:

> "A Court of Bankruptcy has an exclusive and non-delegable control over the administration of an estate in its possession."

citing *Isaac v. Hobbs Tie & Timber Company*, 282 U. S. 734, wherein Mr. Justice Roberts upon the authority of *U. S. Fidelity & G. Co. v. Bray*, 225 U. S. 205, said at page 739:

> "Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

Again as to the exclusive power of the bankruptcy court, this Court recently held that in reorganization proceedings under Section 77B that upon the attaching of the court's jurisdiction the stockholders cease to have any power over the management of affairs. In *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, one of the contentions made by stockholders in support of the plan of reorganization was that their major contribution to the reorganization which would justify their inclusion in the plan was "the waiver of their right to defer or put off foreclosure until 1944, i.e., to remain in possession . . . ." But this contention the court stated, by Mr. Justice Douglas, "does not stand analysis." Continuing he said:

"The right to remain in unmolested dominion and control over the property was necessarily waived or abandoned on invoking the jurisdiction of the Federal Courts in these proceedings. *When that jurisdiction attached, the court rather than the stockholders was in control*, with all of the powers and duties which that entailed under Sec. 77B." (Italics supplied.) 308 U. S., 127.

The receiver was in no wise under the control of the bankrupt; but he was in control of the affairs of the bankrupt and yet that control was limited. A receiver is the fiduciary agent of the court with limited powers which are defined by the order of his appointment. *Matter of Singer Furniture Corporation*, 47 F. (2d) 780; *Matter of Metropolitan Motor Car Co.*, 225 F. 274. The extent of his authority is always measured by the order of appointment, the statute and subsequent direction from the court. *Matter of Harley*, 10 Am. B. R. (N. S.) 687. Custody of the property by the receiver calls for an attendant duty on his part to protect it until delivery of actual possession to the trustee when one is appointed.

"More is required than honesty; a receiver is a fiduciary; he undertakes to care for the property and manage it for the creditors, to act with assiduity and with reasonable competence."—per L. Hand, *J.*, in *Matter of Piece Dyeing Co., Inc.*, 89 F. (2d) 37, 40.

The receiver or trustee is not empowered merely by virtue of his appointment to conduct the business of the bankrupt. *Matter of Wiener*, 7 F. Supp. 691, aff'd. (C. C. A. 3) 72 F. (2d) 1010.

The ordinary duties of a receiver or trustee in bankruptcy are to collect, preserve and liquidate the assets of the estate, *Imperial Assurance Co. v. Livingston* (C. C. A. 8), 49 F. (2d) 745; without specific authorization he has no power to make any expenditures for the operation of the business. Nor is he under any duty to apply for such authorization, irrespective of motive for failure to do so. *Matter of Wiener*, 7 F. Supp. 691.

Appointment of a receiver "with all the usual rights and powers thereof" does not authorize the receiver to continue the business. *Matter of Harley* (Ref. Cal.), 10 Am. B. R. (N. S.) 687. Power to continue the business is given by Clause 5 of Section 2(a) of the Bankruptcy Act which provides that courts of bankruptcy shall have jurisdiction:

> "to authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals or trustees if necessary in the best interest of the estate * * *"

Without such authorization the receiver had no power to continue the business. General Order XL as amended January 16, 1939, provides:

> "A receiver or marshal appointed by the court to take charge of the property of a bankrupt after the filing of a petition, shall be deemed to be a mere custodian within the meaning of Section 48 of the Act, unless his duties and compensation are specifically enlarged by order of the court upon proper cause shown either at the time of appointment or later."

It is important in this discussion of bankruptcy to note that under Section 70(a) Par. 5 of the present Act (as amended by the Chandler Act and similar provisions of the prior acts) the right to the certificate would pass to the Trustee in bankruptcy. Much is made in the reports of Division 5 and the full Commission of the fact that the bankruptcy receiver failed to continue the operations of the bankrupt.

Under Section 2(a) 5 the court is definitely instructed in the class of cases in which it may authorize the continuance of operations and when considered along with other provisions of the Act encouraging prompt liquidation of the estate, the court is justified in continuing operations only when it is clear that benefit will result to the estate. Section 70, par. (b) of the present Act is a Chandler Act Amendment and provides that within sixty days after ad-

judication, the Trustee shall assume or reject any executory contract, including unexpired leases of real property. Apparently under this provision the lessor of real property will not know whether the trustee will assume the responsibility of the lease or reject it until sixty days after adjudication. In effect, any action is suspended during that period. This section merely enacts the existing law on the subject as developed by the courts, which was to the effect that the trustee had a reasonable time in which to resume or reject executory contract, e.g. *In Re United Cigar Stores*, 69 F. (2d) 513, 515. If the Commission's view is correct that the right to operate under the grandfather clause carries with it the obligation to operate, it would seem that the receiver or trustee would have at least sixy days in which to decide whether it was worth while to assume the responsibility that would go along with the privilege.

In view of the foregoing we respectfully submit that the interruption of service after the bankruptcy was not within the control of the bankrupt nor were the causes of the bankruptcy; in short, that neither mediately nor immediately was the bankrupt responsible for the failure to operate.

C.

The Interstate Commerce Commission was responsible for the continued interruption of operations.

Discussion of the question of control over interruption of service which occurred in this case requires an examination of the conduct of the Interstate Commerce Commission with respect to the various applications made to it.

The state receiver never suspended operations. (R. 28, 61.) On October 14, 1937, he petitioned the Commission for authority to suspend and six weeks later, November 30, 1937, this petition was denied on the ground of lack of authority. Meanwhile, the bankruptcy receiver had taken over, suspended operations and sold the rights to operate

to the intervener-appellant, Northeastern Transportation Company, the transfer being made on December 24, 1937. Application for approval of the transfer and substitution of Northeastern as applicant in the "grandfather" applications was made to the Commission on January 7, 1938, or excluding Sundays and holidays within ten days from the date of transfer. (Report of the Commission, R. 75.) The intervener according to its complaint (R. 92) "repeatedly requested the Interstate Commerce Commission to act upon the application for substitution in order that it might file tariff rates and operate in interstate commerce." The application was not disposed of until June 13, 1940 (R. 95), which was after the filing of the complaint in the District Court.

The reason why the Commission neglected or failed or refused to act upon the application is not shown by the record. As a usual thing such applications are disposed of within from one to two weeks.

Why, it might be asked, were not the wheels kept turning any way; why did not those who were interested operate at all costs? The answer is plain upon the record; instructions were issued by representatives of the Commission not to operate.

The following testimony was given by Howell Lenck when he was recalled for further examination by the examiner.

"Q. Well, who were the applicants that you refer to now in this case; I presume you refer to the Northeastern Transportation Company?

A. Yes, sir."

(fol. 76):

"Q. Would they be permitted to resume operations, in your opinion?

A. We took that up with the local official of the Interstate Commerce Commission and on his advice have not attempted to operate."

In its complaint the intervener-appellant says:

> "This intervener further says that what operations were started, preparatory to commencing business, were suspended at the urgent request of Roy M. Snetzer, District Director of Division 5 of the Interstate Commerce Commission, and his assistant, William Hubbard."

Morgan v. United States, 304 U. S. 1, held that "in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play." (p. 15.) Is the observance of these "rudimentary requirements of fair play" required of administrative bodies only in connection with a hearing? We believe not. To so confine the application of the principle is to invite abuse in one area while forbidding it in another.

The Commission, we submit, acted unfairly throughout the time that it had jurisdiction of the matter. It refused to act upon the application for substitution; it applied a hard and fast rule of law to a case where it was not warranted by the facts as disclosed after a full hearing; its representatives by their requests practically forbade operations. In one instance the Commission refused to take the necessary step to let the successor in interest know whether it could operate, on the other hand, through its representatives it requested that no operations be resumed until the Commission had acted upon the application. In short, the Commission by its course of conduct effectively controlled the situation to the extent that it directly influenced the decision of those in charge not to continue operations. Yet the Commission says the interruption of operations brought about a loss of rights because the interruption was within the control of appellants and the lower court decision upheld this view.

We think this was not fair play. We think it is an attempt on the part of the Commission to shift responsibility

for a regrettable situation from its own shoulders where it rightly belongs. Appellants are not alone in thinking that the Commission is responsible; Commissioners Alldredge and Splawn also thought so. (R. 81.)

POINT VI.

THE COMMISSION AND THE DISTRICT COURT ERRED IN DECIDING THE QUESTIONS OF BANKRUPTCY LAW INVOLVED.

A.

The decision destroys, instead of preserving, assets, which is one of the prime purposes of the Act.

The decisions of this Court dealing with the Bankruptcy Act have developed a settled doctrine concerning the purposes and the aims of the Act. The original purpose of the bankruptcy statute was simply to effect an equitable distribution of the bankrupt's property among his creditors. *Straton v. New*, 283 U. S. 318; *Kothe v. R. C. Taylor Trust*, 280 U. S. 224. What was formerly considered to be a secondary purpose to the main purpose set forth above, the discharge of the debtor from his obligations, is now recognized to be equally important with the original objective. *Central Trust Company v. Chicago Auditorium Association*, 240 U. S. 581. One of the purposes of the Bankruptcy Act was to bring about a speedy distribution of the bankrupt's assets, and this has been held to be second only in importance to securing equality of distribution (*Bailey v. Glover*, 21 Wall. 342), and in *Francis v. McNeal*, 228 U. S. 695, it was held that it was the purpose of the Bankruptcy Act so far as possible to preserve existing business relations and not to upset or interfere with fundamental incidents thereof.

The decision of the Commission which the court below upheld does violence to these notions of the purpose of the Bankruptcy Act. When a policy is adopted which can result in nothing but the destruction of the most valuable

asset, it is useless to speak of speedily and equally distributing the assets. This, however, is what the Commission with the sanction of the District Court has done.

A motor carrier has no more valuable asset than his primary asset which is the right to operate. He may have a fleet of the finest trucks, fully paid for, he may have ample cash in the bank and good credit lines, in addition, he may have a crew of expert drivers and handlers. If, however, he has not an operating right, he is in a worse position insofar as conducting a business and making profits is concerned, than is the carrier who owns but one truck and operates it himself. Yet this most valuable asset of a motor carrier is wiped out by the decision in this case whenever a motor carrier is either so unfortunate or improvident, it matters not which, to become bankrupt. The statement of the effect of the doctrine as viewed by Commissioner Lee in his dissent in the report of Division 5 follows:

> "If such interruptions in service are to be construed as putting an end to 'grandfather' rights of carriers, whose applications therefor have not been determined, then, where such a carrier goes into receivership or bankruptcy, and such an interruption occurs, it would be impossible for the carrier to come out of receivership and resume operations; it could not effect a composition or an arrangement with its creditors and resume operations; if a corporation, it could not be reorganized under the corporate reorganization provisions of the Bankruptcy Act, and creditors could realize nothing from 'grandfather' rights, however valuable. I cannot believe that Congress so intended."

and Commissioner Alldredge in his dissent to the report of the Commission states, R. 80:

> "The effect of the conclusions reached by the majority will be to wipe out the operating rights of a large number of motor carriers who have had the misfortune to become bankrupt during the long period since June 1, 1935."

Such a result as this works great hardship on creditors; it perverts the purposes and objectives of the Bankruptcy Act, and should be rejected by this Court as being directly contrary to the spirit of decisions of this Court dealing with the subject.

B.

The decisions of the Commission and the District Court are based upon doubtful authority.

The Commission in reaching its decision "that voluntary and involuntary bankruptcy are within the control of the bankrupt and that he is responsible for the legal consequences that flow from the adjudication" admitted that it knew of no decision in support of its conclusion but thought it had found an analogy in *Central Trust Company v. Chicago Auditorium Asosciation*, 240 U. S. 581. (R. 74.) The district court held that "the rule or policy established by the Commission seems supported by the holding "in that case." (R. 101.)

We think that the case is not in point and that it is of very doubtful authority for reasons set forth below.

That case held that an adjudication of bankruptcy where the bankrupt was the promisor of an executory contract "is the equivalent of an anticipatory breach of an executory agreement." The reason that the court reached that decision is clearly set forth in the opinion and must be considered in order to get the true meaning of the decision and its applicability to other situations.

At pages 591 and 592 the court said:

> "Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract

that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. *Williams v. U. S. Fidelity Co.*, 236 U. S. 549, 554. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Roehm v. Horst, supra.*"

The foregoing quotation clearly demonstrates that the decision is based upon a desire to determine the rights of bankrupt and creditor with reference to the objectives of the Act "to permit all creditors to share in the distribution of the assets of the bankrupt and to leave the honest debtor thereafter free from liability upon previous obligations." The language must be read with that view in mind and as limited by the facts of the case, *Bramwell v. U. S. Fidelity & Guaranty Co.*, 269 U. S. 483, 489; *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 413.

When so considered we submit that the analogy fails. There are no executory contracts involved in this case. No creditor of the bankrupt is pressing for recognition of an anticipatory breach with consequent right in him to have his claim recognized.

The facts are so dissimilar as to afford no basis for applying the reasoning and the principle involved; and there is no warrant in the past decisions of this Court to determine the issues here, with their bearing upon administration of a regulating statute, upon principles evolved in a case primarily involving private rights.

C.

Central Trust Company v. Chicago Auditorium Association is in conflict with provisions of the Bankruptcy Act as amended and should be overruled.

Section 70(b) of the Bankruptcy Act as amended by the Act of June 22, 1938, provides in part that:

> "Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property * * *."

This is directly contrary to the doctrine of *Central Trust Co. v. Chicago Auditorium Association* that an adjudication of bankruptcy is the equivalent of an anticipatory breach of an executory agreement.

It requires no argument or citation of authority to demonstrate that if the trustee is allowed a period within which to assume or reject the contract, the adjudication cannot bring about a breach because if this were so there would be no contract for the trustee to assume or reject. The statute and the decision are mutually contradictory and the decision, of course, is superseded by the statute.

Appellants submit that the authority of the decision has been destroyed and it cannot form the basis of the decision in this case.

POINT VII.

THE COMMISSION IN ITS DECISION UPON THE QUESTION AS TO WHETHER OR NOT CESSATION OF OPERATIONS WAS WITHIN THE CONTROL OF THE APPLICANT HAS ACTED IN AN ARBITRARY AND UNJUST MANNER AND NOT IN ACCORD WITH ITS OWN PRIOR DECISIONS.

A review of the decisions of the Commission, in those cases which have required it to pass upon the question of whether or not the interruption of service had been within the control of the applicant, shows that it has been surprisingly inconsistent and discriminatory. Some of the more conspicuous examples of this action by the Commission are set forth below. In some cases, the Commission has rigidly applied a hard and fast rule. In other cases it has done just the opposite. In some cases the misfortunes of the applicant have appealed to the sympathies of the members of the Commission. In other cases, such as this, misfortune has been attributed to the applicant instead of being regarded as something which it had suffered.

In the instant case the Commission has said that the interruption of service, which was an interruption of only about six weeks before the operating rights were sold, was fatal to the grandfather rights and that they had expired. Every presumption has been indulged against appellants; circumstances which were responsible for decisions favorable to other applicants were ignored by the Commission or were said to have no bearing in this case.

On July 3, 1941 the Commission by Division 5 decided the case of *H. H. Enders Truck Line, Inc. Common Carrier Application*, 29 M. C. C. 639. In that case it appeared that Enders on January 24, 1936 had applied for a certificate of public convenience and necessity as a common carrier. On March 27, 1936 he sold to the Yellow Cab Transit Co. ten of his trucks and whatever interstate operating rights he

had in Texas and Oklahoma, including two certificates issued by the Railroad Commission of Texas and a permit issued by the Oklahoma Corporation Commission, which were subsequently transferred by the respective states to the Yellow Cab Transit Co. On April 11, 1936 Enders ceased operating and, as the Commission found on page 640 of its report, "The operations have not been continued since by anyone." The Commission then goes on to say on page 641:

> "* * * He discontinued because he had sold to applicant and was without State authority following the transfer of the certificates and permit to applicant. The record also indicates the Enders was in financial difficulties. Apparently for the same reason the Enders Corporation did not resume the operation following our approval of its substitution as applicant in lieu of Enders. It is clear that applicant was prepared and about to continue the operation when advised by our Bureau of Motor Carriers that such operation prior to our approval of the purchase, would be unlawful. It accordingly refrained from operating pending determination of the purchase application but it has continually and urgently requested prompt action thereon by the Commission. It also made application which was denied because we then had no power to grant temporary operating authority. A subsequent amendment of the act now permits us to authorize temporary operation under conditions prescribed by the amendment.
>
> Applicant contends its failure to resume the operation was due to the failure of this Commission to act upon the purchase application, a cause beyond its control; that it did everything possible to legally operate and should not be penalized because it complied with the law whereas other operators have been granted certificates where they operated purchased property without authority prior to the Commission's approval of the purchases."

The Commission found that Enders had sold because of financial difficulties but that there was no intention on the

part of anyone to abandon operations. Continuing, the Commission states at page 642:

"Applicant did not operate because it was advised by someone connected with our Bureau of Motor Carriers that to do so without first having obtained approval of the purchase would be a violation of the act. It accordingly made application immediately, but final action thereon has been withheld pending determination of the 'grandfather' application, although applicant has continually urged that we act without reference to the 'grandfather' application."

The Commission concluded as follows:

"Under the circumstances it would seem rather harsh to penalize applicant for its failure to operate in violation of the act. The record on the purchase application created considerable doubt as to the scope of vendor's 'grandfather' rights and for this reason, though contrary to our usual practice, we withheld action on the former pending determination of the latter. The latter, however, was in turn subject to delay because of the need for further hearing and the pressure of other work by reason of the large number of applications before us. Applicant did everything possible to operate legally, including the filing of an application for temporary authority but which, at that time, we were without power to grant. In the meantime, applicant was faced with a situation where it could neither legally operate nor control the circumstances. Ordinarily a delay in the final determination of a purchase application in no way excuses a failure of the seller to continue the operation pending our approval of the purchase in the usual course of administrative procedure, but the circumstances here are unusual.

Under the circumstances of this case we are of the opinion that the interruption of service was due to causes beyond applicant's control and a report and order of the Commission, division 5, authorizing the purchase and substitution of Yellow Cab Transit Company as applicant on the instant application is being served concurrently with our report and order herein."

These lengthy excerpts from the decision in the *Enders* case are given because they illustrate so perfectly the inconsistency of the Commission in disposing of these cases and its injustice in overlooking questionable conduct on the part of one applicant and of harshly penalizing another similarly circumstanced. Every fact to which the Commission gave consideration in the *Enders* case, in reaching its conclusion that the interruption of service was beyond the control of the applicant, is present in the instant case. If intent to abandon is the test, and obviously the Commission applied the test, then, since there clearly was no intent to abandon operations in the Gregg case, the decision should have been as favorable as in the *Enders* case.

As to the length of time of the interruption of service, it lasted but a few weeks in the Gregg case before application was made to the Commission to approve the sale. In this case the operations had been discontinued for over five years when the Commission entered its decision which permitted the resumption of operations. The sale and subsequent interruption were due to financial difficulties in the *Enders* case. So were they in the Gregg case. The failure to start operations after the sale was due to the advice and warning of someone from the Bureau of Motor Carriers and the fact that the applicant was waiting for a final determination by the Commission of its application in both cases. We submit that a more perfect example of discrimination in failing to apply the same rules of law to litigants in the same circumstances could not be found.

As to further consideration of the question of intention to abandon being the test, the Commission has said in the Gregg case that (R. 73) "it is not necessary that interruptions of service should rise to the height of an intentional abandonment before they can be deemed to be lost," and yet, in the *Enders* case, the lack of intention to abandon was one of the crucial points upon which the case turned.

In determining whether there was an interruption of service, as contemplated under the Motor Carriers Act, Sec. 206 A, it is necessary to take into consideration not only the length of time during which the service was interrupted but also the character of the operations and the circumstances under which the interruption of the service occurred. This rule is laid down in the case of *Black Hills Transportation Company, Common Carrier Application*, 2 M. C. C. 391, wherein the Interstate Commerce Commission, in effect, held that an interruption must be tantamount to abandonment in order to prevent a carrier from securing his certificate of convenience and necessity under the Grandfather's Clause.

In *Williams Transportation Co., Inc.*, Docket No. MC-9888, the Commission again had under consideration a case wherein there had been a cessation of operations because of a request or intimation by a representative of the Bureau of Motor Carriers that operations should cease, and yet the Commission found that :

> "The actual suspension was in supposed compliance with our views and with the understanding that such action would facilitate, rather than jeopardize, final approval of the application. At no time was there any intent to abandon the service. Under the circumstances, the interruption of service cannot be held fatal to any rights which might otherwise exist."

In *John Minnehan Contract Carrier Application*, 26 M. C. C. 533, the Commission stated as follows:

> "In determining whether interruption of service was beyond the control of applicant, the length of time of such interruption, as well as the character of the operation and the circumstances under which it occurred, must be considered."

If this is the true test, then the applicant in this case was much more entitled to receive the certificate than the applicant in the *Enders* case. The interruption in the

Gregg case occurred after control of the company had passed from the officers of the corporation and the length of time of the interruption was negligible, compared with the years in which there was no operation whatsoever by the Enders Company.

The Commission has been similarly inconsistent in connection with other interruptions which occurred because of financial difficulties or bankruptcy. In *Nevin Midland Lines Common Carrier Application*, 4 M. C. C. 547, a carrier had been adjudicated bankrupt in involuntary proceedings and had been enjoined from operating for nearly a month, yet the Commission said on page 550:

> "This interruption of service appears to have been one over which applicant herein had no control and it cannot be said to have destroyed the continuity of its operation."

In *Kirk Transportation Co. Common Carrier Application*, 7 M. C. C. 362, the applicant had met with financial difficulties and from May 28, 1936 through the first part of June of that year finance companies repossessed all but three units of his equipment. The Commission held that this curtailment of service caused by the action of the finance companies and the interruption of operations resulting therefrom were beyond the control of the applicant, stating at page 365:

> "When the finance companies began repossessing its equipment, its officers although recognizing that some curtailment was necessary, had no intention of abandoning the operations;"

Here again we have the intent to abandon as the test although it was rejected in the Gregg case. Other instances might be given wherein the Commission has taken similar action in refusing to be consistent in connection with financial difficulties and bankruptcy cases, but the examples given here well illustrate the course which these decisions have taken.

In *Rea & Starr Common Carrier Application*, 2 M. C. C. 387, it was held that where operations had been suspended because of notification by a representative of the Interstate Commerce Commission that service was being conducted without authority such suspension was not within the control of the applicant. In *W. D. Cochran Common Carrier Application*, 3 M. C. C. 717, operations had been suspended at the insistence of a State inspector. The Commission held that such suspension was not within the control of the applicant and also employed the intent to abandon test. The Commission said (p. 719):

> "Clearly, applicant and his predecessors at no time abandoned their service. They were willing at all times to carry interstate traffic and stopped only at the insistence of the State inspector, although they felt that the ruling relied upon by that inspector was invalid and unlawful. True, they did not institute court proceedings to test the validity of the ruling, but this, the record indicates, was due to their reluctance to engage in litigation with the State authorities. Rather, it appears that they preferred to contest the issue informally with the Michigan commission, which action is said to have resulted in the withdrawal of the ruling. In the circumstances, we conclude that the interruptions of service described were ones over which applicant and his predecessors had no control."

In *O & W Transit Company Common Carrier Application*, 4 M. C. C. 575, it was disclosed that there had been no operation over one of the routes applied for from January 10 to May 1, 1936. This interruption of service had been brought about by the fact that the Director of Highways of Washington had restricted truck operations of certain parts of it in accordance with certain weight limitations. This the applicant claimed would have permitted it to carry revenue loads of from only 1,000 to 1,900 pounds. The Commission stated (p. 577):

> "Applicant therefore concluded that it would not be profitable to operate under such load restrictions,

and accordingly discontinued operations over this route during the period mentioned.

"In determining whether an interruption of service was beyond the control of an applicant, the length of time of such interruption, as well as the character of the operations and the circumstances under which it occurred must be considered. Clearly the issuance of the State order was beyond the applicant's control. It is true that, by transporting loads within the limits set by that order, applicant could have continued to carry on operations and to render its common-carrier service, but it appears reasonably certain that such operations would have been unprofitable. Moreover, it is plain that applicant never intended to abandon its service in question and resumed it as soon as the order was rescinded."

The decision is particularly interesting because the Commission has so often stated that failure or refusal to operate because of lack of profit was no excuse. *Hunt Common Carrier Application*, 3 M. C. C. 261; *Conor Common Carrier Application*, 1 M. C. C. 327.

In *Flamming Common Carrier Application*, 20 M. C. C. 63, William J. Flamming filed a grandfather application in his own name, and on September 22, 1937, he received a copy of an order of the Commission in the name of Flamming Motor Express, Inc. that had been dismissed. The order was under the docket number assigned to Flamming, but the name thereon was not his own. Nevertheless, without any further investigation he discontinued operation until March 25, 1938, when the previous order was vacated and set aside. This was held to be a suspension of operation which was within the control of the applicant. Other instances might be given, but it is believed that the foregoing is sufficient to show that action of the Commission, or action by the State, either does or does not excuse interruption of service according to the whim of the Commission. Failure to apply the test equally to all applicants results in an unjust and arbitrary discrimination.

The Commission has been similarly discriminatory in cases involving illness, lack of insurance, lack of business, lack of capital and other causes. A representative list of these cases is set forth in Appendix B.

We submit that this long course of conduct on the part of the Commission, which is so perfectly exemplified by the instant case, should be condemned by this Court.

Respectfully submitted,

HOWELL LEUCK,
H. D. DRISCOLL,
BINGHAM W. ZELLMER,
H. RUSSELL BISHOP,
Attorneys for Appellants.

APPENDIX A.

Part II of the Interstate Commerce Act.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

Sec. 206. (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle, subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from

the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE.

Sec. 209. (a) Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this para-

graph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

SUSPENSION, CHANGE, REVOCATION, AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES.

Sec. 212. (a) Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (a), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been

violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

Bankruptcy Act Sec. 70 (B) 11 U. S. C. Sec. 110 (B).

Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: Provided, however, That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee: Provided, however, That the court may for cause shown extend or reduce such period of time. Unless a lease of real property shall expressly otherwise provide, a rejection of such lease or of any covenant therein by the trustee of the lessor shall not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable. A trustee who elects to assume a contract or lease of the bankrupt

and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns such contract or lease to a third person, shall not be liable for breaches occurring after such assignment.

APPENDIX B.

Representative List of Cases Decided by Interstate Commerce Commission Involving Question of Whether or Not Interruption of Service Was Within the Control of the Applicant. Those Cases Decided Favorably to the Applicant are Marked *

ACTION BY COMMISSION		
Ray & Starr	* 2 MCC 385	
Miller Trucking Lines	10 MCC 485	
Stevens	13 MCC 714	
Flamming	20 MCC 63	
Hughes	22 MCC 219	
Enders	*29 MCC 639	
ACTION BY STATE		
Cochran	* 3 MCC 717	
O & W Transit Co.	* 4 MCC 575	
Perry	4 MCC 630	(violation of law)
Contract Carriers Sedan Travel Assn.	7 MCC 209	(violation of state law)
Caravans, Inc.	9 MCC 659	(state tax)
Lubfin	12 MCC 563	(state law and insurance)
James	14 MCC 723	(state confiscation of tags)
Crooks	23 MCC 509	
BANKRUPTCY		
Tanis	2 MCC 18	
Nevin Midland Lines	* 4 MCC 547	(injunction in connection with bankruptcy)
Sooner Distributing Co.	22 MCC 541	
Wisconsin Motor Exp. Co.	22 MCC 633	
Sunset Trail Exp.	22 MCC 713	(receiver)
Martin Motor Lines	23 MCC 313	
Knopp Broker Applic.	23 MCC 727	
Van Transp. Lines	24 MCC 302	
CHANGE IN ROUTE		
Capital Motor Lines	* 1 MCC 462	
Jaax	1 MCC 597	
Fleming	* 8 MCC 469	
Central Ky. Film Serv.	* 8 MCC 735	

Equipment, Loss or Damage of		
Hauptman	3 MCC 144	(loss of truck)
Southeast Arkansas Frt.	7 MCC 143	(lack equip. & capital)
Allen	8 MCC 743	(poor equip.)
Hughes	10 MCC 346	(damaged truck, insurance)
Jones	18 MCC 253	(trucks needing repair)
Brown	23 MCC 125	(execution on equip.)
Thompson and Bookshinis	22 MCC 503	(repair period)
R. D. Fowler Motor Lines	24 MCC 179	(repossession of truck)
Financial Difficulties		
Feigenbaum	1 MCC 745	(also illness)
Denco Bus Lines, Inc.	8 MCC 188	
Kirk Transp. Co.	* 7 MCC 362	
Northland Greyhound Lines	16 MCC 530	(fin. dif. of predecessor)
Shansky	17 MCC 797	(also physical disability)
Stewart	19 MCC 665	
Kaplan	20 MCC 70	(also injury)
Metro Motor Frt.	22 MCC 78	(refinancing)
White Star Frt. Line	23 MCC 407	
Brown	11 MCC 491	(and sale)
Illness and Death		
Blue and Grey Trucking Co.	9 MCC 193	
De Brine	9 MCC 51	
L. T. Puryear & Co.	10 MCC 377	(illness of officers)
Barringham	20 MCC 606	
Blackburn	20 MCC 747	
Conklin	*11 MCC 475	(death of predecessor)
Kaplan	20 MCC 70	
Insurance		
Lubfin	12 MCC 563	(also state law)
Gulf States Exp.	9 MCC 251	
Loss of Traffic or Lack of Traffic		
Black Hills Transp. Co.	* 2 MCC 391	
Penn Bus Co.	2 MCC 278	(voluntary interruption)
Baker	2 MCC 737	(availability of traffic)
Beekley	3 MCC 255	
Kirk Transp. Co.	* 7 MCC 362	(operation curtailed by receiver)
Woodrow Bros.	* 8 MCC 259	
Perkins	*10 MCC 495	
Berger	11 MCC 43	(traffic lost to competitor)

Oilfields Trucking Co.	12 MCC 16
Woods	13 MCC 737
Pachall	•14 MCC 224
Dovel	•14 MCC 357
Geroulo	•16 MCC 421
Brown & McCooey	18 MCC 503
Kelly	18 MCC 706
Union Transfer Co., Inc.	19 MCC 659 (slow traffic)
Sentle	21 MCC 49
Barnes Truck Co.	24 MCC 465
Road Repairs, Poor Roads	
L. & L. Freight Lines	• 2 MCC 9
Cardinal Stage Lines Co.	2 MCC 583
Mo-Ark Coach Lines	4 MCC 55
McKay	4 MCC 93 (roads closed by snow)
Angle Star Lines	16 MCC 189
Inter-Carolinas Motor Bus Co.	21 MCC 633 (road construction)
Silver Fleet	23 MCC 331
Walter Stages, Inc.	24 MCC 451
Transfer	
McCall	• 8 MCC 24
Johnson	11 MCC 665 (and repossession)
Cross	23 MCC 517
Weather	
Waltz Transp., Inc.	•10 MCC 30 (also breach of lease, strike)
Elliott	•11 MCC 148 (floods)
Miscellaneous	
George Cassens & Sons	1 MCC 771 (as to actual operation to all points claimed)
Southeast Arkansas Freight Line, Inc.	7 MCC 89
Holland Highway Exp.	8 MCC 461 (failure to commence service after purchase)
Holmes	• 8 MCC 391 (change by shippers)
Missouri Pc. Transp. Co.	9 MCC 273 (agreement with competitors)
Film Pickup Service	•10 MCC 364 (closing of theatres)
Brown	11 MCC 491 (sale and financial dif.)
Quaker Stages, Inc.	14 MCC 387 (uncertainty as to rights)
Western Truck Lines	14 MCC 369 (non-existent service)
Williams	14 MCC 747 (lack of identification tags)

Steel	MCC 99	(continuance of operation found though applicant advised Com. he intended to discontinue)
D. L. Hartman Cartage Co.	18 MCC 4	(operation by receiver)
Eaton	22 MCC 791	(inability operate profitably)
Riddle	22 MCC 204	(merely holding out)
Lewis Motor Transp. Lines	23 MCC 197	
Myers	23 MCC 451	(competition)
Mutual Transfer Co.	23 MCC 657	(foreclosure)